No. 15219

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

CENTURY INVESTMENT CORPORATION and VIRGIL J. PAGUE,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

ARTHUR G. BARNETT and VIRGINIA N. BARNETT, His Wife; DONALD F. OWENS and JEAN OWENS, His Wife; EDWARD R. ESTER and LORRAINE M. ESTER, His Wife,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeals from the United States District Court, Western District of Washington, Northern Division.

HONORABLE JOHN C. BOWEN, *Judge*

REPLY BRIEF OF CENTURY INVESTMENT CORPORATION AND VIRGIL J. PAGUE

LYCETTE, DIAMOND & SYLVESTER and LYLE L. IVERSEN,
Attorneys for Century Investment Corporation and Virgil J. Pague

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800 Hoge Building
Seattle 4, Washington

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REPLY BRIEF OF CENTURY INVESTMENT CORPORATION AND VIRGIL J. PAGUE

I.

THE GOVERNMENT FAILED TO PROVE ANY DAMAGES

The brief of the government argues that the lower court in lieu of granting specific performance of the contract for the removal of the buildings could in-

stead grant damages. (Respondent's Brief, page 13, et seq.) If an equity court has the right to grant damages in lieu of specific performance of the contract, it must still follow some legal *measure of damages* and cannot allow damages merely as a punitive measure, but must grant them upon some theory of compensation for pecuniary injury. The government's argument begs the question as to the validity of the government's case with respect to damages. The government in this case failed to prove any monetary damages. This failure of proof was fatal to any recovery of damages.

This is a civil action for breach of contract. The government in this case contracted with a citizen to accomplish a certain purpose and the government prepared the contract and is no different from any other litigant with respect to the application of the laws relative to contracts. Liquidated damages were not provided for. Actual pecuniary injury to the government was not proved. If the government failed to draw a contract which accomplished what Respondent thinks should have been its objects, the government is nevertheless bound by the contract that it did enter into. The Supreme Court of the United States in the case of *United States v. Standard Rice Company,* 323 U. S. 106, 89 Law Edition 104, expressed the applicable rule on page 111, where it said:

> "Although there will be exceptions, in general the United States as a contractor must be treated as other contractors under analogous situations. When problems of the interpretation of its contracts arise the law of contracts governs . . . We will treat it like any other contractor and not revise the contract which it draws on the ground that a more prudent one might have been made. *U. S. v. American Surety Company,* 322 U. S. 96, 88 Law. Edition 1158, 64 S. C. 866."

It was the government which prepared paragraph 2 of the general conditions of the contract (Tr. 13) prescribing the performance security and stating:

> "The purchaser is liable for any expense incurred by the government as a result of his failure to abide by the terms of this sale, including the removal of the units sold hereunder within the time stated herein, and leaving the site in a satisfactory condition. The purchaser shall be liable for the full amount of damages *determined by the contracting officer* to have been occasioned by his failure to comply with the provisions of this sale, whether or not such damages are secured by the performance security." (Emphasis supplied.)

The government is bound by the general rule that a contract will be most strongly construed against the party preparing it. The Court of Claims in the case of *Peter Kewitt Company v. United States,* 109 Ct. Cl. 390, applied this rule and said at page 418:

> "This rule is especially applicable to government contracts where the contractor has nothing to say as to its provisions."

By the terms of the contract entered into between

the parties the method of determining damages was stated and the determination was entrusted to the contracting officer.

The government has not established a determination by the contracting officer of the damages in this case, and the parties did not contract for the court to substitute its judgment for that of the contracting officer in determining damages. Respondent's brief, on page 25, attempts to argue that this failure of the government to prove the determination of the contracting officer was not raised in the proceeding below. This is a gross error as this point was urged continuously and vigorously at all stages of the proceeding. Those portions of this appellant's brief relating to the failure of the contracting officer to make a determination have their counterpart in the trial brief of these defendants filed in the lower court and identified as document 73 in the certificate of the clerk to record on appeal (Tr. 131). Reference is made to page 12 of that memorandum (Tr. 131). The failure of the government to prove the decision of the contracting officer as to damages was a fatal failure of proof.

The respondent's statement on page 23 of its brief to the effect that the provision of the contract calling for determination of damages by the contracting officer is not binding on the government, ignores plain legal principles. Counsel for the gov-

ernment cite no cases to sustain that contention and it has been repeatedly held that a provision in a contract leaving determinations to a contracting officer will be binding upon both the government and the other contracting party. 91 C. J. S. 212 states the general rule as follows:

> "A contract with the United States may lawfully provide that a specified government officer or board shall have the right to make certain determinations with respect to the performnace of the contract, and that the decisions of such officer or board shall be binding on the parties. Accordingly, when the parties to a government contract agree that the decision of an engineer or other officer or board as to matters of dispute that may arise during the execution of the work, such as disputes involving questions of fact, shall be final and conclusive, or that the decision of the officer shall be determinative of other particular matters specified in the contract, such decision ordinarily is final, and it is not subject to revision in the courts, as discussed infra subdivision c (3) of this section. Similarly, where it is agreed that a specified officer shall interpret the drawings, specificaitons, etc. or shall determine what is required under the contract, the determination of the officer is conclusive. Under such provisions, *both the United States and the contractor are bound by the officer's ruling . . .*" (Emphasis supplied.)

A contracting officer under such a provision in a contract does not act exclusively as the government's advocate but has the duty of being a neutral arbitrator and such a provision in the contract gives the parties the assurance that the decision will be

made by one familiar with the immediate facts and competent to make an expeditious decision. Federal courts have repeatedly held that the government is bound by such a provision of the contract and there is no authority to substitute the judgment of any other officer or agent of the government for the judgment of the contracting officer. Thus, in *Phoenix Bridge Company v. United States,* 85 Ct. Cl. 603, where a contract provided that the amount of liquidated damages should be determined by the contracting officer, it was held that an initial decision by the Comptroller General assessing liquidated damages was invalid. The court said on page 629:

> "In the *United States v. North American Commercial Company,* 74 Fed. 145, 149, it was held that where a contractor reposes upon the good faith and the discretion of some public officer representing the government, that is an implied obligation upon the officer that he will not act arbitrarily or capriciously but will exercise an honest judgment and that 'the party who has agreed to be bound by that judgment is entitled to have it exercised in good faith by the officer nominated *and cannot be bound by the substituted judgment of another authority.*'" (Emphasis supplied.)

The case just cited is directly in point here and illustrates the fact that the contractor, as well as the government, has the advantage of the provision for determination by a contracting officer. A case to the same effect is *Bell Aircraft Company v. United States,* 100 Fed. Suppl. 661, 120 Ct. Cl. 398,

affirmed 344 U. S. 860, 97 Law Ed. 668. There it was held that a decision made by a contracting officer, as specified in the contract, must be the only effective decision and that the comptroller general had no right to substitute his judgment for that of the contracting officer.

The government in this case is bound by the provisions of the contract which it drew and the contractor was entitled to have the damages, if any, determined by the contracting officer and there is no authority under the contract to substitute the judgment of the court. We suspect that the reason a contracting officer's decision was not produced was because a contracting officer would not have found that any damages occurred. Certainly there was no evidence in this case of any actual monetary damage suffered by the government, nor any expense incurred by the government in connection with the failure to remove from the premises the buildings which the government had sold.

The rule that the government has the same duty of proving damages as any other litigant has been recognized by this court.

In the case of *Lomax Transportation Company v. United States,* 183 F. (2d) 331 (9CCA 1950), this court said on page 333:

> "Though it follows that appellant was under the contract absolutely liable for any loss or

domage to the supplies stored with it, it was, of course, incumbent upon the government to prove by competent evidence the amount of the damages sustained."

The government, like any other litigant, cannot recover damages without proving them. The profits earned by appellants from renting the buildings have no remote relation to expense or damage incurred by the government.

II.

THERE WAS NO OCCASION FOR SPECIFIC PERFORMANCE AND THERE WAS NO OCCASION FOR DAMAGES

The government argues that damages were awarded here in lieu of specific performance. Damages in lieu of specific performance will not, under recognized legal principles, be allowed unless there was a right to specific performance. There was no such right here. The rule is stated in 49 Am. Jur. 196 as follows:

> "The awarding of damages by a court of equity in a suit for specific performance in lieu of a decree of performance is exceptional, for the very reason that jurisdiction of such suit depends on the essential fact that a judgment at law for damages would not be an adequate remedy, and jurisdiction to award damages is exercised only under special circumstances, to prevent injustice. Ordinarily, a bill for specific performance will not be retained for the assessment of damages where the plaintiff fails to

make out a case for specific performance, and no other special equity is shown which will support jurisdiction of the court . . ."

In this case the court specifically held in the supplemental findings of fact and conclusions of law (Tr. 107, 108) that the government had not sustained the burden of proving its exclusive right to possession of the land and therefore was not entitled to have the buildings removed. The court specifically found:

"Findings of Fact

I.

"That it was incumbent upon the plaintiff herein to prove its exclusive right of possession of land upon which the buildings, furniture, furnishings, equipment and appurtenances involved herein have, at all times material to this action, been and are now located.

II.

"That the plaintiff has not fully sustained that burden in that although the judgment in the declaration of taking and the judment awarding just compensation were valid, the plaintiff has not proved that the future ascertainable installments of such just compensation have been paid; therefore, the court cannot find that such installments have been paid and accordingly the court now finds that the plaintiff is not entitled to the requested order that the defendants be specifically compelled to remove said buildings and clear the sites upon which they stand. This finding is based upon the necessity of the plaintiff establishing in this action its exclusive right of possession of said real estate."

If the government had no right to specific performance of the contract by reason of its failure to prove its exclusive right to possession of the land, it also had no right to obtain damages for use of that land to which it had not established exclusive possession.

III.

THE GOVERNMENT'S BRIEF GOES OUTSIDE THE RECORD

In its brief, the government makes frequent excursions outside of the record to volunteer information not proved at the trial and not in accordance with the facts. On page 14 of its brief the government counsel says:

> "Also the government had been obliged to expend money to renew its use and occupancy of the land for an additional year . . ."

There is absolutely no proof that the government expended any money to renew its use and occupancy.

The government, on page 10 of its brief, alleges:

> "The administrative practice had been for the taxpayers to pay the taxes and then submit their tax statements to the Public Housing Administration for reimbursement."

This statement in the brief, which is apparently intended to indicate that the court was wrong in holding that the government failed to pay the consideration for the leasehold is wholly without the record

and is contrary to what these appellants know to be the facts. It will be noted that counsel cite no portion of the record for this statement and the fact that these payments were not made as found by the court (Tr. 107) is strong proof that there was no such administrative practice. The decision of the district court to the effect that the government had failed to establish its right to exclusive possession was an important part of the supplemental findings of fact, and the statement made by counsel that: "Apparently in order to avoid the forced removal of the buildings (which had been improved to meet the code requirements of the City of Seattle, supra, page 8) the district court apparently used the tax matter discussed above as justification for awarding damages only rather than ordering specific performance of the contract as it had previously determined" (Respondent's brief, page 8), is a gratuitous assumption not justified by the action of the lower court nor by anything in the record.

The counsel for the government in footnote 5 on page 6 of their brief again introduce matter not within the record by quoting what they are advised by the Public Housing Administration with respect to the granting of extensions by the housing authority of the City of Seattle. The footnote says:

> "In this connection the Public Housing Administration has advised . . ."

We submit that matter introduced for consideration of the court in this manner is not properly to be considered in the disposition of this appeal.

IV.

APPELLANT PAGUE IS NOT THE ALTER EGO OF CENTURY INVESTMENT CORPORATION

Counsel for the government attempts to infer that Virgil J. Pague is the alter ego for Century Investment Corporation (Respondent's brief, page 23). There is nothing in the record to sustain any such contention and the citation of statements by other appellants having adverse interests to this effect are entirely baseless. Pague was only one of three equal shareholders according to the evidence. The lower court found in paragraph 5 of the findings of fact (Tr. 23) that the incorporators of the company were Virgil J. Pague, Albert A. Ronati, and Orville Cohen. The lower court made no finding that Pague was the alter ego of Century Investment Corporation and the fact that there were two other stockholders holding ⅔ of all the stock in the corporation negatives any contention that Pague was the alter ego of the corporation. There is nothing in the record to indicate that Pague controlled the corporation. The lower court did not deal with Pague as the alter ego of the Century Investment

Corporation. There was no evidence upon which any such conclusion could have been arrived at and there is no justification for the reference in the government's brief to Pague, the owner of the minority of the stock of the corporation, as being the alter ego of Century Investment Corporation.

Respectfully submitted,

LYCETTE, DIAMOND & SYLVESTER
and LYLE L. IVERSEN,

Attorneys for Century Investment Corporation and Virgil J. Pague

Office and Post Office Address:
800 Hoge Building
Seattle 4, Washington